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**SUPREME COURT OF THE UNITED
STATES**

OCTOBER TERM, 1940.

No. 443

CLARA E. HARE, ET AL., PETITIONERS,

VS.

ALLEN W. HENDERSON, ET AL., RESPONDENTS.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT, AT NEW ORLEANS, AND
BRIEF IN SUPPORT THEREOF.**

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PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners respectfully present this Application for Writ of Certiorari in the above entitled cause to the United States Circuit Court of Appeals for the Fifth Circuit; and for grounds thereof, show the following:

**SUMMARY STATEMENT OF THE MATTERS
INVOLVED.**

Petitioners filed this suit in the Federal Court at Beaumont on the 17th day of June, 1938; and on January 5, 1939, amended their pleadings on which the case was heard (R. 1).

The suit was to recover the title and possession of 640 acres of land in Orange County, Texas.

As alleged in plaintiffs' amended petition, the claim of title was a deed from defendants' parents, dated October 11, 1902, to Frank Mills, reciting \$6,717.00 paid in cash, and the reservation of a vendor's lien to secure a note for \$2,783.00; and a deed dated October 24, 1912, from Mills to plaintiff Clara E. Hare, then Clara Brown.

The vendor's lien notes, petitioners alleged "became barred and extinguished, with the equitable lien which secured it four years after its due date, on October 11, 1905, and that thereafter all claim or right arising out of such promissory note as affecting these plaintiffs' purchase of said land, became extinguished under the statutes of four years limitation, which are here pleaded in bar of any claim as having been assertable against this land by the defendants' parents, or by themselves.

"Moreover while said transaction, as hereinbefore stated, was barred against any right to enforce such equitable vendor's lien against this land in the hands of your plaintiffs, if such lien had been an express contractual lien whereby any right of the original vendors could exist against this land, such assumed or presumed superior right, title or claim became extinguished and conclusively established as matter of law as having been terminated, annulled and stripped from all right, interest or claim by the said original vendors and their heirs under the Acts of the Legislature of the State of Texas of 1913, and under the Acts of 1911, and the laws of the State of Texas established in the Code of 1925, as well as all succeeding legislative provisions, not only barring such claims by limitations, but terminating and destroying them as incumbrances or stale claims upon the lands in the hands of vendees as against assertions of claim and ownership on the part of

vendors. And in this connection, the plaintiffs invoke the statutes of limitations as provided in the aforesaid Acts as a complete bar to any such claims if such are asserted against the plaintiffs by the defendants, or any of them, in this suit" (R. 14).

And petitioners also in the alternative offered to do equity by tendering the amount of the vendor's lien notes, as follows:

"If, however, for any reason the defendants, or any of them, are allowed in this proceeding to assert against the plaintiffs any right, title, interest, claim or demand growing out of or incidental to, or inherent in, the before mentioned transaction, and if such claims are allowed to be asserted against these plaintiffs in this proceeding upon any ground, legal or equitable, and any condition be imposed upon these plaintiffs growing out of the same to pay any part or parcel of said deferred payment provided in Mills' note to the Hendersons, then, and in such event, these plaintiffs here tender and offer to do equity" (R. 14-15).

Among other defenses, respondents pleaded a rescission of the sale and deed made by their parents to Frank Mills, as follows:

"That on, to-wit, November 14, 1914, suit was instituted in the District Court of Orange County, Texas, in the county where said land was located, by said Guardian and by the said Allen W. Henderson, to evidence a rescission, which rescission had already taken place, and which suit also in legal effect amounted to a rescission of said contract of sale, represented by said deed, which land had not been paid for, and in such action, on, to-wit, November 26, 1915, judgment was rendered in favor of said plaintiffs, being the defendants for whom this answer

is now filed, against the said Frank Mills'' (R. 21-22).

And set out in full said judgment.

And in this connection further pleaded, as follows:

''That such judgment has been duly recorded in the deed records of Orange County, Texas, and is in all respects a valid judgment.

''That thereafter these defendants paid up the delinquent taxes upon said land, and have since paid taxes thereon, have claimed the land as their own, have sold timber therefrom, have leased the land, have had possession thereof by virtue of the cutting of timber therefrom, and other possession, each and all of which acts, including the institution of said suit, amounted to a rescission of said contract, under which plaintiffs purport to claim, and for which land they never paid said defendants or any of them.''

''That by virtue of the foregoing judgment title to said land has been decreed to be in these defendants, as against plaintiffs, and their predecessors in title, and same is here now plead to be *res adjudicata* of all issues involved in this law suit'' (R. 24).

And they further specially denied the pleas of limitation in plaintiffs' petition; and further denied that the laws of limitation set out therein were applicable (R. 24).

The case was heard by the court without a jury; and decided by judgment entered on February 2, 1940 (R. 42); which judgment was pursuant to findings of fact and conclusions of law, filed at the same time (R. 30-42).

As said in the opinion of the Circuit Court of Appeals:

''The District Judge, on full findings of fact, sustained the defense of rescission and abandonment,

and gave judgment for defendants. Plaintiffs, appealing, insist that the findings do not support the judgment, but require a judgment for them." (Opinion, Record)

The fact findings of the District Court, on which the defense of rescission was sustained, are as follows:

"After the death of the father and mother of the above named children, S. W. Henderson was duly appointed and legally qualified as guardian of the three youngest children, the oldest child having reached his majority.

"On November 14, 1914, suit was instituted by Allen W. Henderson and the guardian of such minors against Frank Mills in the District Court of Orange County, Texas, for the land in question, and omitting the description, the following judgment was entered by such Court on November 26, 1915, pursuant to citation duly issued and served by publication" (R. 37).

(Copy of judgment omitted.)

"An attorney was not appointed to represent Frank Mills and no evidence was actually offered in the District Court and no statement of facts filed.

"After entry of such judgment an affidavit of heirship was filed by the Hendersons in 1920. An oil and gas lease was executed by the Henderson heirs in 1932 on the 300 acres of land in controversy.

"Thereafter, on March 23, 1932, these Henderson heirs executed an oil and gas lease to P. L. Howe, covering about 300 acres of this survey, and it was recorded in Orange County on July 22, 1932. It was an ordinary oil and gas lease, but was at the expiration of one year annulled and released.

“And in 1923, George H. Henderson, one of the defendants, sold to a man named Rogers about 40,000 feet of timber from this land, which he took off in about two months. The price was \$190.00 cash.

“And about 1918, or 1919, he had the land surveyed, and was in there doing that work about a week.

“And in September, 1938, the defendants, Henderson heirs, leased 200 acres of the land to the Sun Oil Company for oil purposes, and received therefor the sum of \$4000.00, with an additional obligation to pay within a year an additional sum of \$6000.00 or forfeit the lease. The Sun Company did not pay the other \$6000.00, but cancelled the lease.

“A certificate of redemption was issued to the Hendersons on August 26, 1921, by the Tax Collector of Orange County, Texas, relating to taxes for the years 1912, 1913, 1914, 1915, 1916 and 1917 and 1918, and upon the same date a similar certificate was issued covering taxes for the years 1902 to 1911, but apparently relating to one-half of the taxes due for the latter period and one-half for judgment, interest and penalties accruing for the former years and based upon judgment for taxes in cause No. 2992.

“On November 9, 1927, and February 23, 1929, tax receipts were issued to the Hendersons for payment of taxes upon this land. A tax receipt was issued on January 26, 1929, in payment of 1928 taxes. On January 6, 1931, tax receipt was issued to the Hendersons in payment for taxes due for the year 1930, and on January 12, 1932, a tax receipt was issued to the Hendersons for payment of taxes due for the year 1931.

“The certificate from the Comptroller's office at Austin, showing tax assessments of this land be-

ginning with the year 1900 and ending with the year 1918, shows the following with reference to taxes between those years:

In 1900 J. L. Henderson, by G. T. B. Cox, Agent, assessed 640 acres.

"In 1901 and 1902, this land was assessed as unknown, and it continued to be assessed as unknown until the year 1918" (R. 38-39).

And the District Court in his conclusions of law, decided as follows:

"The Hendersons elected to and did rescind the contract of purchase. Regardless of the legal effect of the judgment as such in the suit filed in 1914, it, coupled with the other facts, evidences an intention upon the part of the original grantors and their heirs to rescind, and as such is binding upon all parties herein.

"I further conclude that the record here shows that the vendee had actually abandoned the contract, or at least had so acted as to create the reasonable belief on the part of the vendors and their heirs that she had abandoned it, and that under such circumstances the vendors and their successors were entitled to rescind without notice of their intention, notwithstanding the part performance by the vendee.

Miller v. Horn, 149 S. W. 769.

Evans v. Bentley, 29 S. W. 497.

"As to the claim made by plaintiffs under Articles 5694 and 5695, Vernon's Sayles' Annotated Civil Statutes of 1914, that the lien and superior title were barred by limitation, I conclude that the Supreme Court of Texas in construing these articles, has decided that they do not affect the right of the vendor as holder of the superior legal title, but only bar his right of action thereon when affirmatively asserted by him in the courts.

"*Bunn v. City of Laredo*, 245 S. W. 426, holds directly that a defensive claim under the superior title such as defendants assert in this case, does not fall within the bar of these statutes.

"See also *Benn v. Security Realty & Development Co.*, 54 S. W. (2d) 146.

"It appearing that in the deed from Frank Mills purporting to convey the land in controversy to Clara E. Brown, now Hare, that it was expressly stated that 'It is hereby agreed and stipulated that there is a vendor's lien note against the above described property for (2783 dollars) drawing 5 per cent interest and due on or before 3 years from October 11, A. D., 1902.' That the rescission of the contract by which the Hendersons sold to Mills is binding upon Mrs. Hare, the sub-vendee, who bought with notice of the lien of the Hendersons" (R. 40-41-42).

The Circuit Court of Appeals affirmed the judgment of the lower court on the 9th day of July, 1940 (R.), with written opinion of the same date (R.).

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

I.

Under the plain and unambiguous language of Article 5695, passed by the Legislature of the State of Texas in 1913,

"Those owning the superior title to land retained in any deed of conveyance,"

where the vendor's lien notes were barred by limitation at the time of the passage of the act, were given the specific remedy of suit for the land within twelve months after the act became effective.

Which remedy, as said by Chief Justice Cureton of the Supreme Court of Texas, in construing this article of the statute in *Cathey v. Weaver*, 242 S. W., p. 452:

"Is to be construed as denying to him any other remedy."

The suit was brought by the Hendersons in Orange County against Mills, who had conveyed the land to Mrs. Brown twelve years before the filing of the suit, and who was not made a party thereto.

Therefore, the judgment taken therein against Mills has no binding effect upon Mrs. Hare (then Brown), as *res judicata* or as evidence of notice to Mrs. Hare of any intention on the part of the Hendersons to rescind the deed which their parents had made to Mills.

And the Circuit Court of Appeals in its opinion in holding that this judgment was binding upon Mrs. Hare, as notice of an intention upon the part of the Hendersons to rescind the deed, has denied to her the protection of her property rights guaranteed to her by the due process of law clause of the first section of the Fourteenth Amendment to the Constitution of the United States.

II.

The limitation statute, Article 5695, passed by the Legislature of the State of Texas, in 1913, giving the vendor of barred vendor's lien notes the specific remedy of suit for the land within twelve months after the passage of the Act, provided:

"Unless such suit is brought within twelve months after the act takes effect, they shall be forever barred from bringing suit to recover the same."

The Hendersons brought no suit against Mrs. Brown, now Hare, who then held the title which the Hendersons had conveyed to Mills by deed from Mills to her, dated October 24, 1902, but brought suit against Mills without making Mrs. Brown a party.

The petition in the suit alleged the residence of Mills to be unknown, and prayed for citation by publication. No attorney was appointed to represent Mills.

The judgment was taken by default, without the introduction of any evidence, or a statement thereof filed (R. 38).

Therefore, the judgment, even against Mills, was absolutely void, and was without any effect against Mrs. Hare, who was not a party to the suit, because the court had no jurisdiction of the suit to render a judgment against Mills, as suits against persons whose residence is unknown, by constructive service by publication to recover land, under the statutory law of Texas, is a special jurisdictional proceeding under Articles 2172-2175 of Chapter 23, Vernon's Sayles' Texas Civil Statutes of 1914, by which articles of the statute the court had no jurisdiction over Mills to render a judgment by default, but could only acquire jurisdiction by appointing an attorney to represent the absent defendant upon proper answer filed by him and legal evidence introduced, reduced to writing, and filed in the suit.

Therefore, the Circuit Court of Appeals in its opinion, in giving effect to this judgment as an act on the part of the Hendersons sufficient to give notice to Mrs. Hare of their intention to rescind the deed to Mills, has denied to Mrs. Hare her property rights guaranteed to her under the due process of law clause of the first section of the Fourteenth Amendment to the Constitution of the United States, and has annulled in this case the long established rule of law in the State of Texas.

III.

Under the statute, Article 5695, passed by the Legislature of the State of Texas in 1913, where the vendor lien notes were barred by limitation at the time of the passage of the act, the only remedy allowed by the statute to the vendor holding the superior title was to bring suit

against the original vendee; or, if he had conveyed, against the person holding the title under him, within twelve months, to recover the land.

This limitation statute of 1913 was expressly construed by the Supreme Court of the State of Texas, in *Cathey v. Weaver*, *supra*, as denying to the owner of the superior title, by reason of the barred vendor's lien notes retained in the deed, any other remedy, including the remedy by rescission. (*Fleming v. Todd*, 42 S. W. (2) 123.)

Therefore, the former remedy of rescission, before the passage of this act, was entirely abolished; and the Circuit Court of Appeals erred in holding that the judgment in the suit filed by the Hendersons against Mills, without making Mrs. Brown, now Hare, a party thereto, coupled with acts thereafter on the part of the Hendersons, beginning years afterwards, by paying the delinquent taxes and leasing a part of the land for oil, and selling a small amount of timber from the land, evidences notice to Mrs. Hare, then Brown, of an intention upon the part of the Hendersons to rescind the deed made by the Hendersons to Frank Mills.

The decision of the Circuit Court of Appeals is, therefore, arbitrary and contrary to the local law of Texas, and in conflict with the opinion of the Supreme Court of Texas, by Chief Justice Cureton, in the case of *Cathey v. Weaver*, *supra*, directly and authoritatively construing said statute; and by such arbitrary construction of this statute by the Circuit Court of Appeals Mrs. Hare has been denied her property rights, contrary to the local law of Texas and its uniform and repeated construction by the Supreme Court of Texas.

IV.

The Circuit Court of Appeals has erred in its opinion in holding that the limitation statute of 1913 "did not destroy the vendor's superior title to prevent his effective rescission of it by rescission against his vendee's default, and particularly against his abandonment;" and

in holding that the lower court "expressly approved and reaffirmed the long and unbroken line of decisions affirming the vendor's right of protection by a timely rescission against a defaulting vendee, and his successor in title. *Bunn v. City of Laredo*; *Benn v. Security, Realty & Development Co.* note, *supra*."

Neither of these cited decisions touched the question here involved, because in both of these cases, by the terms of the deeds, no title, legal or equitable, was passed to the vendees therein; but by the terms of such deeds merely an equitable right on the part of the vendees to acquire title upon the performance of the express precedent condition that they pay off and discharge the vendor's lien notes. This right of contract on the part of the vendor, to retain all title to the land, was inviolate under the state and national constitutions, and could not be affected by the limitation statute of 1913, as decided in the opinion of the Commission of Appeals of Texas in the cited case of *Bunn v. City of Laredo*, 245 S. W., page 426, and as expressly held by the Supreme Court in that identical case; and the Circuit Court of Appeals in its opinion has erred in ignoring and refusing to observe this distinction. And in so doing, has deprived Mrs. Hare of her property rights contrary to the local law of Texas and its uniform construction by the Supreme Court of Texas.

ASSIGNMENT OF ERRORS.

In addition to the four preceding grounds for granting the writ, which are adopted as assignments of error, the following additional assignments of error are requested to be passed upon and determined by this court:

FIRST:

The Circuit Court of Appeals erred in not reversing the judgment of the trial court and rendering judgment for petitioners, because the deed from Mills to Mrs.

Brown, now Hare, dated October 24, 1902, conveyed the legal title to this land to her without any assumption on her part of the debt of Mills, but subject to enforcement of the vendor's lien against the land. And when Mills' obligation was allowed to lapse for non-payment, without any extension on his part of the payment of the obligation, the title held by Mrs. Hare could not be affected after the note became barred by limitation. The only remedy under the facts as against this land for the enforcement of Mills' obligation, was to bring suit to recover the land from her and not Mills. And since the statute of 1913 limited the right to proceed against her to twelve months from the passage of that act, and no suit was brought against her within such time, the superior title of the vendor and the right of rescission was thereafter forever extinguished.

SECOND:

And in the event only that the above and foregoing assignments of error are by the court overruled, then, in the alternative, petitioners assign as error the action of the Circuit Court of Appeals in denying to them the right either to pay off the vendor's lien notes or have an adjustment of equities therein set forth and to pay such amount, if any due, as a condition precedent to and right to recover.

Conclusion.

Wherefore, your petitioners respectfully pray that the writ of certiorari issue to the United States Circuit Court of Appeals, for the Fifth Circuit, at New Orleans, Louisiana, in this case, commanding that court to certify and to send to this court for review a full and complete

transcript of the record and proceedings in cause No. 9462, styled Clara E. Hare, *et al.*, appellants, vs. Allen W. Henderson, *et al.*, appellees; and that the judgment of said Circuit Court of Appeals, and of the trial court, be reversed and rendered in favor of your petitioners as prayed for in said Circuit Court of Appeals.

Your petitioners pray for such further and other relief in the premises as this Honorable Court may deem just.

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NOTE: Ten copies of petitioners' brief in the Circuit Court of Appeals, are filed as exhibits to this petition. They contain the Texas Statutes and their full and complete construction by the State Supreme Court, effectively and arbitrarily denied to these petitioners in this case.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

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ALLEN W. HENDERSON, ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion in the Circuit Court of Appeals has not been reported, but a certified copy of the same is attached to and made a part of the record (R. ...).

II.

JURISDICTION.

(1) The date of the judgment to review, is July 9, 1940 (R. ...).

(2) The grounds and reasons which are relied upon as the basis of this court's jurisdiction, are fully set out in four separate grounds in this petition, at pages 8-12, under the heading of "Reasons Relied Upon For The

Granting of The Writ;" which said four grounds are here referred to for consideration as fully as if re-copied herein.

(3) The above grounds of jurisdiction referred to, fully set out a denial of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and that the opinion of the Circuit Court of Appeals is in conflict in its construction of the local statutory law of Texas, with the uniform decisions of the Supreme Court of Texas.

(4) The due process clause of the first section of the Fourteenth Amendment to the Constitution of the United States, together with the cases believed to sustain the jurisdiction, are set out in said above four grounds.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given in the petition, under the heading "Summary Statement of the Matters Involved," found on pages 1-8 of the petition, to which reference is made.

IV.

SPECIFICATIONS OF ERROR.

We adopt each of our four grounds of jurisdiction as four separate assignments of error, and refer to same on pages 8-12 of this petition without re-copying here.

We also refer to, without re-copying here, our first and second assignments of error, on pages 12-13 of this petition, to be considered in the event the writ is granted.

V.

ARGUMENT.**First Point.**

In the case of *Postal Telegraph-Cable Co. v. City of Newport*, 247 U. S. Reports, page 464, 62 L. Ed., p. 1215, the Supreme Court of the United States took jurisdiction to review a state court judgment, as shown by head note No. 4, as follows:

“The decision of a state court that a judgment against a corporation, rendered in a suit begun two years after it had conveyed all its property in the state to another corporation through which a third corporation afterwards acquired title, concluded the latter corporation as being in privity of estate with the first-named corporation, is too clearly ill-founded to sustain its judgment against reversal in the Federal Supreme Court.”

The 2nd head-note of the decision is as follows:

“The theory of privity of estate may not be invoked to make a judgment against a prior owner conclusive against his successor in interest, where the suit in which the judgment was rendered was not brought until after the grantor had parted with the title.”

And in the course of the opinion on the point, it is said:

“The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction (citing authorities). The opportunity to be

heard is an essential requisite of due process of law in judicial proceedings (citing authorities). And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing, or opportunity to be heard (citing authorities), so it cannot without disregarding the requirements of due process give a conclusive effect to a prior judgment against one who is neither a party, nor in privity with a party therein" (p. 1221).

In this case Mills had conveyed the title to the land to Mrs. Brown, now Hare, in ~~1892~~¹⁹⁰², twelve years before the institution of the suit in Orange County by the Hendersons against Mills to recover the title to the land. And since Mrs. Brown, now Hare, was not a party to this suit, the judgment therein could not affect her directly or indirectly, as erroneously decided by the Circuit Court of Appeals, to give her notice of an intention on the part of the Hendersons to rescind the deed which their parents had made in 1902 to Frank Mills.

Mr. Justice Holmes, in the case of *Chicago Life Insurance Company v. Cherry*, 61 Law Ed. U. S. 969, said:

"A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant. But it must be taken to be established that a court cannot conclude all persons interested by its mere assertion of its own power (*Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897), even where its power depends upon a fact and it finds the fact (*Tilt v. Kelsey*, 207 U. S. 43, 51, 52 L. Ed. 95, 99, 28 Sup. Ct. Rept. 1)."

The case of *Coe v. Armour Fertilizer Works*, 59 L. Ed. U. S. 1027, is relevant to this question. In that case

the Armour Fertilizer Works recovered a judgment in the Circuit Court of Florida against the Parrish Vegetable & Fruit Company, a corporation, and execution having been returned unsatisfied against the defendant, levy was made upon the property of Coe as a stockholder in the defendant corporation to recover under his stock certificate "an amount equal to the amount remaining unpaid upon the subscription stock of the said Henry L. Coe to the stock of said corporation."

Under a statute of Florida at the time a stockholder in a corporation was liable for the debts of the corporation to the extent of "an amount equal to the amount remaining unpaid upon the subscription—to the stock of said corporation." And the statute in force at the time of the levy made no provision for notice to the defendant Coe.

Coe sued out an injunction against the levy and sale which the lower court determined against him. And on appeal to the Supreme Court he contended that the statute was unconstitutional in fixing the amount of his liability as his unpaid subscription to pay the debts of the corporation without due notice and an opportunity to be heard. But the Supreme Court overruled the contention and affirmed the judgment of the lower court. And this was the question presented to the Supreme Court of the United States.

And the court, in deciding that the statute of Florida undertaking to visit constructive notice upon the stockholder in the corporation to determine his indebtedness upon his stock subscription, held that it was in violation of due process of law as provided in the Fourteenth Amendment to the Constitution of the United States.

The case of *McDonald v. Mabee*, 243 U. S. Rep. 87..., 61 L. Ed. 608, settles the question that on collateral attack of a state court judgment, the federal right of question as to whether the defendant in the state court suit was properly brought before the court, is open to inquiry in the Federal courts.

In that case, the first judgment taken in the case of *McDonald vs. Mabee* was offered by Mabee in the second suit by McDonald against him as an estoppel. The Supreme Court of Texas decided that the first judgment was an estoppel. But the Supreme Court of the United States held that this first judgment presented the question of due process of law, requiring the Supreme Court to review the facts and determine if such notice was given Mabee as was required by the due process clause of the Fourteenth Amendment of the Constitution. And the Federal Supreme Court, upon re-examining the facts, decided that they were insufficient to give such notice, although the Supreme Court of Texas had decided that they were.

Second Point.

The purported judgment taken in the Orange County suit filed by the Hendersons against Frank Mills was a nullity, and without any binding effect even upon Mills, because the court was without jurisdiction over Mills to hear the case and render judgment. And certainly such void judgment could not affect Mills' prior vendee, Mrs. Brown, with any notice on the part of the Hendersons to rescind the deed made by the Hendersons to Frank Mills.

Vernon's Sayles' Texas Civil Statutes, Vol. 2, Chapter 23, provides:

“Article 2172. Actions maintainable against non-residents.

“An action may be brought and prosecuted to final decree, judgment or order, by any person claiming a right or interest in or to any property in this state, against any person or persons who are non-residents of this state, or whose place of residence is unknown, or who are transient persons, who claim an adverse estate, or interest in, or who claim any lien or encumbrance on said property, for the purpose of determining such estate, interest, lien, or encumbrance, and granting the title to said property, or settling the lien or encumbrance thereon” (Acts 1893, p. 77).

Article 2173, *Id.*, provides for service on such persons by publication.

Article 2174 specifies the prerequisites in the pleadings.

Article 2175 is:

“Judgment by default cannot be rendered. No judgment by default shall be taken in such case by reason of the failure of the defendant to answer; but the facts entitling the plaintiff to judgment shall be exhibited to the court on the trial; and a statement of the facts shall be filed as may be provided by law in suits against non-residents of this state where no appearance has been made by them.”

The foregoing special jurisdictional statutes have received the following judicial construction in both the United States and Texas courts:

Galpin v. Page, 85 U. S. 350-375, 21 Law Ed. 964; *Murray v. Am. Surety Co.*, 17 C. C. A., page 138; *Mingus v. Wadley*, 285 S. W. 1088.

The case of *Sewell v. Spitzer*, 234 S. W. 1085, decided that a prior vendor, such as Mills, having previously sold the land, could not by such proceeding be a party under the law, or affect the rights of his vendee.

The Court said:

“Dan Spitzer having parted with his own interest in the property, Articles 2172 to 2177, inclusive, of the Revised Statutes, have no application.”

Third Point.

In the present case, from and after the year 1914, neither constructive nor actual notice would give the right to a holder of a vendor's claim, under any circumstances, to rescind such conveyance. Such right was conclusively barred by the Acts of 1913 and the uniform decisions of the Supreme Court, above referred to, giving a conclusive and final effect to such bar.

The Legislature of 1913, and the special session of 1913, as to *vendor's lien notes executed prior to July 14, 1905*, provided by Article 5695, as amended, as follows:

“And providing those owning the superior title to land retained in any deed of conveyance or his transferee and those subsequently acquiring such superior title by transfer, shall have twelve months after this Act takes effect within which to bring suit for the land, if their claim to the land is not otherwise invalid, and unless suit is brought within twelve months after this Act takes effect, they shall be forever barred from bringing suit to recover the same.”

Until the day that the above act of the Legislature took effect, the vendor holding the superior title to a conveyance made *before 1905* was without limitation as to

time for bringing a suit based upon said superior title to recover the land; and there was no time limit barring the vendor's right to rescind the sale and recover from the vendee the subordinate title by act of the parties out of court. But the limitation statute of 1913, above quoted, by its terms gave the vendor twelve months after the act took effect to bring suit for the land, and unless the suit was brought within twelve months, the vendor holding such superior title would be forever barred from bringing suit to recover the land.

The act, by its terms, not only limited the time in which the vendor might bring suit for the land, but by its terms *took away all other rights, including rescission from the vendor holding such superior title.*

In the case of *Calvin v. Olscheweke*, 62 S. W. (2d) 571, Judge Pleasants said:

"Plaintiff's right to a rescission, in this suit, of the deed by Mrs. Lohff conveying the land to appellee, and her right to recover any unpaid balance upon appellee's note, are barred by the statute of limitations pleaded by appellee."

In the case of *Fleming v. Todd*, 42 S. W. (2d) 123, it was held (headnote 7 thereof, as follows):

"Purchasers acquiring absolute title when vendor's lien became barred by limitation could not be divested thereof and title re-invested in vendor by purchasers' oral consent to rescission by vendor."

Chief Justice Walker, in deciding that the vendor having lost his superior title by limitation *was without right or power to declare a rescission*, said:

“The allegation of title by rescission was also subject to demurrer. Notwithstanding what we have said about construing the petition as to the notes recited in the deed, if it should be correctly construed as resting the rescission upon these notes, appellant can have no relief upon such allegation because these notes were barred by limitation in May, 1926, the date of the rescission. If the rescission rests upon a contract to execute notes to mature February 1, 1921, and February 1, 1922, with the notes recited in the deed, such notes and contract were also barred in May, 1926. Again, if the petition be construed as pleading a contract whereby appellant could compel Todd and Banks to execute notes for the excess acreage, his action upon the contract was within the four years’ statute (Rev. St. 1925, Art. 5527) and, therefore, barred in May, 1926. The bar of the notes operated also as a bar of the claimed vendor’s lien. The bar of the vendor’s lien made the title in Todd and Banks absolute. It follows that, having lost his superior legal title by limitation, appellant was without right or power to declare a rescission in May, 1926.

“The allegation that Todd and Banks consented orally to the rescission was also subject to the demurrer. The absolute title being vested in them, it could not be divested out of them and reinvested in appellant by the alleged oral agreement. *Sanborn v. Murphy*, 86 Texas 437, 25 S. W. 610” (p. 126).

No claimed acts of rescission on the part of the Hendersons after the judgment taken in that suit, in 1915, can be “coupled” with it; and the court was in error in so deciding, because the proceeding and judgment constituted in law no notice of an intention to rescind the deed either to Mills or his vendee, Mrs. Hare.

The "acts of rescission" thereafter pleaded by the defendants, and enumerated by the trial court, must, therefore, be regarded as entirely disconnected from the suit and judgment in the Orange County District Court.

The first of these acts relied upon to evidence notice of rescission of the deed occurred many years after the judgment was taken in the Orange County District Court.

We have shown that these acts relied upon to give notice of the intention to rescind the deed on the part of the Hendersons to the defendant *would have been insufficient before the passage of the Act of 1913*. However, *after the passage of the Act of 1913, the right of rescission on the part of the vendor was abolished*. To contend otherwise is to affirm that the act in nowise affected the rights of the vendor holding the superior title preventing him, as under the old law, from rescinding the deed without limitation of time, either by suit in court or by the acts of the parties out of court.

And we submit that the Supreme Court of Texas has denied this contention in the opinion of Chief Justice Cureton in the case of *Cathey v. Weaver*, 242 S. W. 452, in the following language:

"The obligation held by the plaintiff in error, Cathey, falls within one of the classes which have been named, and for his benefit the specific remedy of suit for the land within twelve months after the act became effective was enacted. Having specifically provided a remedy for him, or those similarly situated, the statute, as written in this instance, *is to be construed as denying to him any other remedy*. That is to say, if he was the owner and holder of the superior title, and a vendor's lien note thereby secured, but barred by limitation, *his only remedy un-*

der the statute was to file suit for the recovery of the land within one year after the amendment became effective. He held the superior title to the land in controversy at the time the Acts of 1913 became effective, and his note was at that time barred by limitation. Under paragraph 6 of the amended article he was allowed one year after November 18, 1913, to file suit for the land. This paragraph created for him an exception to the general inhibitory terms of Article 5694 as amended. He came clearly within the class to which paragraph (6) applies, but he exercised no rights under it. He did not bring an action to recover the land within the time permitted by law, and therefore cannot recover in this action" (pp. 452-453).

Fourth Point.

The case of *Bunn v. City of Laredo*, 245 S. W. 426, as well as the *Benn* case, *supra* (cited and basically relied on by the courts below), establishes beyond question that the statute of limitation of 1913 did not include or undertake to affect those executory contracts of the vendor which upon their face retained in the vendor the legal and equitable title until the purchase money was paid, for by the terms of the deed the vendor was given the right of forfeiture and re-entry without suit—*purely contracts to acquire title to land.*

In the *Bunn* case, the City of Laredo, by an ordinance, through and under which it made the contract, provided that:

"The purchaser was required to give his promissory note for the balance of the purchase price payable to the City and secured by vendor's lien expressly retained therein; and *providing that in case of default in principal or interest the purchaser should forfeit all right to the land and the City*

Secretary should endorse on the note 'land forfeited' and make an entry to that effect on the account of sales kept by him, and thereupon the land should be forfeited to the City without the necessity of re-entry or judicial ascertainment."

And Judge McLendon, speaking for the Commission of Appeals, in that case, *held that the statute of limitations of 1913 had no application to a contract of this character*; and the court in support of its conclusion cites the case of *Goldfrank v. Young*, 64 Tex. 432, and says:

"And that where the parties themselves have created their own remedy by contract whereby their rights may be enforced independently of the courts, such remedy is not affected by the limitation statute."

And concludes the opinion as follows:

"We think, therefore, that the trial court and the Court of Civil Appeals held that the City's right to forfeit the land in the manner prescribed in the ordinance was not destroyed or affected by the 1913 Act, and that when the City resorted to such remedy and repossessed itself of the land, its title and possession were unassailable by those claiming under the unfulfilled contracts of sale."

The case of *Benn v. Security Realty Company*, 54 S. W. (2d) 147, was where the deed retaining vendor's lien notes *expressly gave the right of forfeiture, re-entry and possession in the event of the non-payment of the notes*, and, of course, comes within the rule of *Bunn v. City of Laredo*.

As hereinbefore pointed out, it is obvious that the statute of limitation of 1913 and its amendments have

no application whatever to executory contracts to acquire title to land, *but related entirely to deeds that were absolute upon their face*, expressly retaining vendor's liens for the purchase money.

So expressly held by the Texas Supreme Court in reviewing these identical cases (see 242 S. W., p. 452, cited *supra*), with which the federal court in this case is in direct conflict.

Fifth Point.

On the alternative contention that in any event the court erred in not adjusting the equities by permitting Mrs. Brown, now Hare, to pay such amount as was due on the notes, after deducting the amount received by the Hendersons for oil leases. If this case were ruled under the law prevailing before the passage of the Limitation Act of 1913, the petitioners were entitled to recover the land on an adjustment of the amount due on the note, or, if respondents, in equity, were entitled to rescind, they should return such part of the purchase money as in equity the court should determine.

In *Evans v. Bentley*, 29 S. W. 497, the deed was made to the wife as her separate property, retaining a vendor's lien to secure the purchase money note which was signed by her husband. Afterwards the vendor brought suit against the husband to foreclose the vendor's lien note, but did not make the wife a party to the suit. Notice was had on the defendant by citation to a non-resident, which was personally served upon him, and judgment taken against the husband and the vendor's lien foreclosed in 1878, and the vendor, buying it in on foreclosure, after getting the sheriff's deed, paid the taxes and exercised all the usual acts of ownership on the

property, and in 1884 sold the lots at an enhanced price, during all of which time there was no claim by the Bentleys, until this suit was filed in 1891. That was the situation when this suit was brought by the wife, joined by her husband, to recover the lots as the separate property of Mrs. Bentley, and, in the alternative, to recover the value of the property which had been sold by the vendor. *The question in the case was whether the suit and judgment against Mr. Bentley was a rescission as to Mrs. Bentley, not a party to it.* The court held, in legal effect, that *it was not such rescission.* And it was a question of settling the equities in the present suit between the parties under the original contract which had not been rescinded by the suit against the husband, because it was legally ineffective as to the wife, and did not, "*coupled with the other facts,*" constitute a rescission. And it was held that as a matter of equity Mrs. Bentley was not entitled to recover the land as upon specific performance, but that in the adjustment of the equities under the contract, that she was entitled to recover the original purchase money and the interest on that purchase money.

The language of the court is as follows:

"We believe, however, where the vendee has paid a considerable portion of the purchase price which has not been repaid in the use of the property, the vendor upon a rescission should account for the amount he has received, with interest. Thomas v. Beaton, 24 Tex. Sup. 318; Coddington v. Wells, 59 Tex. 29. Plaintiff in error in her answer offered to do this. We therefore, conclude that the proper judgment as to these parties to be rendered on the findings and agreement is in favor of Mrs. Bentley for the \$500.00 cash payment made by her, and in favor

of W. J. Bentley for \$813.00 interest on this amount from the date of such payment at this time." (This is on the theory of his community rights to his wife's principal in the interest earned.)

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, and that to such end a writ of certiorari should be granted and this court should review the decision of the Circuit Court of Appeals and finally reverse it.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.-----

CLARA E. HARE, ET AL., PETITIONERS

VS.

ALLEN W. HENDERSON, ET AL., RESPONDENTS

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The opinion of the Circuit Court of Appeals in this case is reported in 113 *Federal* (2d) 277.

Omission from the petition of important facts and what respondents conceive to be inaccurate statements therein compels a more extended reply than otherwise.

The plaintiffs (appellants in Circuit Court; petitioners here) made their designation of the contents of the record on appeal on February 15, 1940, (Record pp.55-56). The defendants made their designation on March 19, 1940, (Record pp. 61,62). The matters designated by defendants have never been included in the printed record. Because of the refusal of appellants to pay any attention to defendants' designation, defendants brought forward a full court reporter's record. Plaintiffs had filed only a partial stenographer's record. Paragraph six of defendants' designation requires the whole reporter's record to be brought

forward (Record 61-62.) This was never done because appellants would not pay for printing the record as required by the rules of the Circuit Court of Appeals (Rule 23). On oral argument the Court stated that instead of considering the Motion to Dismiss the Appeal because of Appellants' failure in this regard, the Court would consider the typewritten transcript. *That transcript is not before you; petitioners did not bring it here.*

Again, in this Court a complete record has not been brought up by Petitioners. They have not served respondents with a designation of the part of the record to be printed; hence respondents have not had an opportunity to file a designation. The first notice which respondents have had was the service of the Petition for Writ of Certiorari and the partial record on September 28, 1940.

Respondents again present, as in the Circuit Court of Appeals, that the record is incomplete, that it is not made up in accordance with the rules and therefore the case should not be considered.

* * * *

The facts found by the two lower courts correspond.

The following quotations from the opinion of the Circuit Court of Appeals show what the suit is about:

"The suit was to recover the title and possession of 640 acres of land in Orange County, Texas. The claim of title was; a deed from defendant's parents, dated October 11, 1902, to Frank Mills, reciting \$6,717.00, paid in cash and the reservation of a vendor's lien, to secure a note for \$2,783.00; and a deed, dated October 24, 1912, from Mills to plaintiff Clara Hare, then Clara Brown." * * * (Rec. p. 65).

“The defenses were (1) that while the deed recited a cash consideration, no cash was paid but only a stock of (†) *worthless merchandise fraudulently misrepresented* by A. H. Brown, the plaintiff Clara Hare’s first husband, at whose request and for whose benefit the deed was made to Mills and by him to plaintiff, and that nothing of value was ever paid for the land; and (2) that defendants as holders of the superior title, long ago had rescinded the sale, because of the 12 years failure to pay any part of the reserved vendor’s lien note and the complete abandonment of the purchase. Defendants also alleged; that, thereafter defendants paid up the delinquent taxes on the land and have since paid taxes thereon, claimed the land as their own, and continuously exercised all the rights of dominion and ownership over it; whereas plaintiff, though taking deed to the property in 1902, subject to the payment of the vendor’s lien had never recorded it or claimed under it but had wholly abandoned her obligations under the contract of purchase, and the land covered thereby; and that the bringing of the suit in 1938, after the third of a century abandonment, was brought about not by plaintiff’s initiative, but as the result of advertisement and solicitation by interested persons whose interest had been directed to the land by the leasing of it for oil by the Sun Company.” * * * * (Rec. p. 66).

“Briefly summarized, this is what was found. In 1902, following a newspaper advertisement, offering to swap merchandise for land, and correspondence between J. L. Henderson and A. H. Brown & Company, Henderson acquired a stock of merchandise from Brown & Company, and he and his wife by deed, dated October 11, 1902, and recorded in Orange County, October 23, 1902, conveyed the land in question to Frank Mills, as Brown’s nominee. The deed

Note: (†) Italics are by counsel for respondents.

recited a consideration of \$9500, \$6717 cash, \$2783 secured to be paid by a note with a vendor's lien on the land expressed to secure the payment thereof. The note recited that it was given in part payment for the purchase money of the land and, that for the securing of it a vendor's lien was acknowledged. On October 24, 1902, Mills executed a deed to Clara Brown, the wife of J. H. Brown, but it was not recorded in Orange County until June 24, 1938. *In 1904, Brown and his associates in the partnership were indicted for fraud on account of this and several other transactions and were convicted and sentenced to the penitentiary as to some of them. (Italics ours).*

"After the execution of the deed from Mills to her, Clara Brown not only did not evidence claim to the land by recording her deed, but she did not evidence it in any other way, nor did she make or offer to make, any payment of principal or interest on the note or taxes on the land. Between the years 1909-1916, she was in Orange, Beaumont, and Lufkin, Texas, but she never asserted any ownership or claim to the land or did anything in regard to it until certain advertisements of date, May 29, 1938, in the Kansas City Star, inquiring for her and her deceased husband's address and that of Mills, came to her attention. Then she contacted the lawyer whose name was signed to one of them and brought this suit. (Italics ours).

"On Henderson's side, these things were done about the land. On April 23, 1904, Henderson wrote to attorneys in Orange to bring suit on the note but nothing was done about it. On April 24, 1908, in reply to an inquiry from Brown, he wrote advising him that he would accept the face amount of the note, waiving the \$800 of accumulated interest and release the land or would give Brown \$50 for the return of all papers, including the deed to Mills. Henderson died July 13, 1908, his wife September 9, 1909, both intestate, and

no administration was had on either of their estates.

"On November 14, 1914, a suit was brought by Allen Henderson, and the guardian of the three youngest children, against Frank Mills for rescission of the contract of sale and there was a judgment divesting title out of Mills and vesting it in the plaintiffs." (Rec. p. 66-67).

The judgment in the suit of the Henderson children, three by their Guardian, against Frank Mills for the land in controversy recited:

"And the defendant Frank Mills, though duly and legally cited in terms of law to appear and answer herein, came not, after being called at the Courthouse door of Orange County, Texas, but wholly made default." (Rec. p. 37).

It further provides:

"And the Court after hearing the testimony and argument of the counsel is of the opinion that the law and the facts are with the plaintiff, and that they are entitled to recover herein." (Record p. 37).

FACTS OMITTED FROM PETITION

(1) The petition does not tell you that Brown and his associates after obtaining this deed from Mr. Henderson were, as found by the District Court:

"About the year 1904 A. H. Brown and the two Rickers were indicted in the United States District Court of Kansas City for mail fraud in connection with this and several other transactions and were later tried and convicted at least as to some of such transactions, and sentenced to serve terms in the penitentiary. Such sentences were affirmed upon appeal and they served terms in the penitentiary at Leavenworth, Kansas." (Record p. 34).

The Circuit Court of Appeals found:

"In 1904, Brown and his associates in the partnership were indicted for fraud on account of this and several other transactions and were convicted and sentenced to the penitentiary as to some of them."
(Record p. 67).

(2) That Mrs. Hare, formerly Mrs. Brown, never asserted any claim to the land in controversy from the date of her deed until after the following occurred:

The District Court found:

"There also appeared in the Kansas City Star on May 22, 1938, the following advertisement:

"'WANTED—Present addresses of Albert H. Brown and wife, Clara E. Brown, or if dead, information relative to heirs. He worked for Greer Mills & Co. in 1902-3 and officed in Hall Building, 1904. Address A 17 Star.'

"Shortly prior to the time of the foregoing advertisements there had been oil activity in the vicinity of this land, and, as alleged by plaintiffs, the value thereof had increased materially.

"The foregoing advertisements or similar advertisements came to the attention of Clara E. Hare, whose husband Brown, had died and who later married Hare. After seeing such advertisement she contacted the lawyer whose name was signed to one of same and he brought this suit for the land in question.

"Up to that time the deed from Frank Mills to Clara E. Brown had not been recorded in Orange County.

"Clara Hare claims to have been in the vicinity of

this land between the years 1909 and 1916 in the carnival business at Orange, Beaumont and Lukfin, Texas, under the auspices of 'American Legion * * * different Committees * * * and different Orders,' but never did anything to evidence a claim of ownership therein." (Record p. 35).

The Circuit Court of Appeals found:

"After the execution of the deed from Mills to her, Clara Brown not only did not evidence claim to the land by recording her deed, but she did not evidence it in any other way, nor did she make or offer to make, any payment of principal or interest on the note or taxes on the land. Between the years 1909-1916, she was in Orange, Beaumont and Lufkin, Texas, but she never asserted any ownership or claim to the land or did anything in regard to it until certain advertisements of date, May 29, 1938, in the Kansas City Star, inquiring for her and her deceased husband's address and that of Mills, came to her attention. Then she contacted the lawyer whose name was signed to one of them and brought this suit." (Record p. 67).

(3) The respondents have been active about their title:
The Circuit Court found in this connection:

"On November 14, 1914, a suit was brought by Allen Henderson, and the guardian of the three youngest children, against Frank Mills for rescission of the contract of sale and there was a judgment divesting title out of Mills and vesting it in the plaintiffs. In that suit no attorney was appointed to represent Mills; no evidence was actually offered in the court and no statement of facts was filed. After the entry of the judgment, the Hendersons continuously exercised acts of dominion and ownership over the land, executing oil leases, selling timber and paying taxes. The land was assessed as unknown from 1902 to 1918, but the record shows payment of back taxes by the Hender-

sons and the issuance to them in 1921, of a redemption certificate as to taxes for the years 1902-1918, and receipts for taxes for some of the later current years." Record pp. 67-68.)

POINTS AGAINST THE PETITION

1. Petitioners show a total misconception of the case when they attempt to present to you that the Circuit Court of Appeals and the Trial Court held that the judgment of Henderson against Mills denies to them due process of law. Due process of law is not in the case. *The basis of this is that Mrs. Hare and her first husband, Brown, never paid for the land, never asserted any title to it and that the Hendersons many, many years ago rescinded the executory contract of sale, and that petitioner abandoned any title she may have had.* Judge Hutcheson said:

"To allow plaintiffs, after nearly a third of a century of complete abandonment, and 25 years after timely rescission of the contract has occurred, to come in now, because of the supposed advance in value of the property, and take it from defendants, would be contrary to the uniform current of Texas authority. The language of the court in the Bunn case in sustaining the right of the vendor applies with peculiar force here.

"The judgment was right. It is

"Affirmed." (Record pp. 71-72.)

The Texas authorities are perfectly plain that where land is not paid for by vendee and it is sold to a sub-vendee and the sub-vendee does not pay for it, that a rescission may be had, not only by filing suit but by many other acts. *Filing suit is one act of rescission.* See Thompson v. Robinson, 93 Tex. 165, 54 S. W. 243; Miller v. Horn, 149 S. W. 769; Evans v. Bently, 29 S. W. 497.

Acts besides filing suit held to be acts of rescission are:

(a) *Retaking possession by vendor:*

Lipscomb v. Fuqua, 103 Texas, 585; 131 S. W. 1061.
Burton v. Dumestre, 86 Fed. (2nd) 947. (Circuit Ct. Appeals, Texas.)

(b) *Conveyance by the vendor to some third person:*

McBride v. Banguss, 65 Tex. 174;
Sherring v. Augustus, 32 S. W. 450;
Scott & Carmody v. Canon, 240 S. W. 304;
Thompson v. Robinson, 93 Tex. 165, 54 S. W. 243;
Waggoner v. Tinney, 102 Tex. 254, 115 S. W. 1155,
 138 S. W. 184;
Toler v. King, 11 S. W. (2d) 360;
Fullerton v. Scurry County, 143 S. W. 971;
Johnson v. Smith, 115 Tex. 193, 280 S. W. 158;
Rooney v. Porch, 223 S. W. 245, 329 S. W. 910, 275
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Barker v. Temple Lumber Co., 120 Tex. 244, 37 S. W.
 (2d) 721;
Church v. Cocke, 120 Tex. 262, 37 S. W. (2d) 723.

(c) *Execution of an oil and gas lease by the vendor to some third person:*

Graham v. Nicholson, 51 S. W. (2d) 1053, (Appl. for writ of error dism.);
Investors Utility Corp. v. Challacombe, 39 S. W. (2d) 175;
Tilley v. Kangerga, 83 S. W. (2d) 787, (Appl. for writ of error ref.).

(d) *Corporate vendor passing resolution and taking possession:*

Fullerton v. Scurry County, 143 S. W. 971.

(e) *Rescission may be by parole:*

Johnson v. Smith, 115 Tex. 193, 280 S. W. 158.

(f) *Vendees' sub-vendee takes subject to vendor's right of rescission:*

Spencer v. May, 78 S. W. (2d) 665;

Scott & Carmody v. Canon, 240 S. W. 304;

Yett v. Houston Farms Development Co., 41 S. W. (2d) 305. (Appl. for writ of error refused);

Tom v. Wollhoefer, 61 Tex. 277;

Fullerton v. Scurry County, 143 S. W. 971;

Barker v. Temple Lumber Co., 120 Tex. 244, 37 S. W. (2d) 721;

Church v. Cocke, 120 Tex. 262, 37 S. W. (2d) 723;

Bothwell v. Farmers & Merchants State Bank & Trust Co., 118 S. W. (2d) 465.

(g) Rescission does not involve the consent of the vendee or someone holding under the vendee. Thus, in *Moye v. Goolsbee*, 124 S. W. (2d) 925, writ of error refused, the then owner of the claim to the land was insane, yet rescission was had by resumption of possession. The rights of minors holding under the vendee are subject to rescission.

Jackson v. Ivory, 30 S. W. 716;

Thompson v. Robinson, 93 Tex. 165, 54 S. W. 243, 77 Am. St. Rep. 843;

Williams v. Tooke, 116 S. W. (2d) 1114, 1124.

The suit by the Henderson children against Mills was instituted on November 14, 1914—four days before the 1913 Act requiring such action. (Appendix, page viii). This does not take into consideration the suspension of limitation for a year after the death of both Mr. and Mrs. Henderson. (Appendix, page xvii). It does not take into consideration the suspension of limitation because of the

fact that the plaintiffs were minors. (Appendix, page xvi). Even under the Act itself, without considering any suspensions, suit was timely instituted. Petitioners attempt to argue the case as though that suit had nothing to do with the rescission, yet, under the Texas authorities, as held by both the Texas Judges, in the District Court and in the Circuit Court of Appeals, the institution of that suit was in itself a rescission. Many additional acts constituting rescission appear, such as selling timber, executing oil and gas leases, and paying taxes.

The statutes involving such situations are discussed at great length in *Cathey v. Weaver*, 111 Texas, 515, 242 S. W. 447. These statutes are not retroactive, either by their terms or under the Texas decisions. The transaction before you arose in 1902, and hence statutes passed later, especially the 1931 statute involved in *Yates v. Darby*, 131 S. W. (2d) 95, urged upon you by petitioners, could not affect the situation.

All such statutes, prior to that of 1925, provided for limitation to be used only defensively in suits by the holder of vendor's lien notes. Such statutes had no application where the vendor had taken possession and vendee should bring suit for the land without paying for it. That is the case before you. See *Bunn v. City of Laredo*, 245 S. W. 426.

Stating it another way, the statute relied on by petitioners affects only a suit by vendor against vendee in any event, and has no effect upon suits by vendees against vendors, where the vendor has previously rescinded and taken possession, and vendee has not paid for the land.

Judge Hutcheson for the Circuit Court said:

“To allow plaintiffs, after nearly a third of a cen-

tury of complete abandonment, and 25 years after timely rescission of the contract has occurred, to come in now, because of the supposed advance in value of the property, and take it from defendants, would be contrary to the uniform current of Texas authority. The language of the court in the Bunn case in sustaining the right of the vendor applies with peculiar force here.

"The judgment was right. It is

"Affirmed." (Record pp. 71-72.)

2. Petitioners attempt to say that *Yates v. Darby*, 131 S. W. (2d) 95, by the Commission of Appeals, Section B, changes the foregoing rules of law. The trial Judge, a Texas Judge, and the Judge of the Circuit Court of Appeals, writing the opinion, another Texas Judge, do not so construe *Yates against Darby*. On the contrary Judge Hutcheson said:

"We agree with appellees. *Yates v. Darby* dealt with an attempted agreed rescission made between vendor and vendee, in February 1933, after a judgment had been fixed against the interest of the vendee. The court properly held that under Articles 5520-23, Revised Civil Statutes, 1925, as amended in 1931, providing 'purchase money on mortgage lien notes relating to real estate shall conclusively be presumed to be paid after four years from the date of maturity of such notes, unless extended as provided by law,' completely protected a third party, such as the judgment lien holder, against action by the vendor either upon the notes or by rescission in or out of court.

"In doing so, the court did not overrule or supersede the decisions, holding that as between the parties, the lien limitation statutes as enacted in 1905 and amended in 1913, which were in force when the Hendersons, within the time fixed by the statute for court action, rescinded the contract of purchase and took

back the land, did not destroy the vendor's superior title or prevent his effective reassertion of it by rescission against his vendor's default and particularly against his abandonment.

"It expressly approved and reaffirmed the long and unbroken line of decisions affirming the vendor's right of protection by a timely rescission against a defaulting vendee and his successors in title. *Bunn v. City of Laredo*; *Benn v. Security Realty & Development Co.*, note supra; *Jasper State Bank v. Braswell*. Nothing in it in any manner impairs or defeats the application here of the principle laid down and applied in these cases and in *Thompson v. Robertson*, 54 S. W. 243, that where the vendor has rescinded the contract and there has been long and complete abandonment by the vendee so that there are no equities in his favor, he will not be accorded the right to sue for the land either with or without the unpaid purchase money, but will be left where the action of rescission and his own conduct have left him, without right or title to the property. *It would be difficult to imagine a case more devoid of equities than this one.*" (Record pp. 69-71.)

3. Both the lower courts held that Mrs. Hare—formerly Mrs. Brown—long since abandoned this title. That was a question of fact, and the two lower courts are agreed on such question of fact.

The abandonment and the rescission each took effect many years before the 1931 amendment discussed in *Yates v. Darby* occurred, and such questions of fact cannot now be reviewed by this court, especially where both lower courts agree thereon.

4. Another point decisive of this case is that when the chain of events involved started, the property in question

was separate property of Mrs. Henderson. (Record p. 31.) The deed was drawn in Texas and taken by Mr. Henderson to Kansas City, where the swap for worthless merchandise occurred. (Record pp. 31, 32.) Apparently the grantee's name was blank and Mills' name was later inserted in the deed. (Record p. 32.) Some change in the consideration for the conveyance was made after Mr. Henderson reached Kansas City. (Record p. 33.) Mrs. Henderson and her husband acknowledged the deed in Texas.

The deed had the grantee's name in blank. The consideration was to be merchandise, and a note, as stated. A deed delivered for a different consideration could not pass her title.

Thus, in *Gulf Production Company v. Continental Oil Company*, 132 S. W. (2d) 553, rentals on an oil and gas lease on the homestead were held not payable in stock, instead of money, as provided in the lease.

Transmission of the title to homestead was involved, and an oil lease was executed requiring money rentals to be paid. Instead of money rentals being paid, stock was given. The court held that the change in the consideration required a new acknowledgment. So here, Mrs. Henderson acknowledged the deed in blank, as found by the Court, and title did not pass to permit a different consideration, from that upon which she was conveying her separate property.

5. The attack here is collateral, not direct. The recitation of service in the decree enforces verity under Texas law and can not be impeached in a collateral proceeding. See

Levy v. Roper, 113 Tex. 356, 256 S. W. 251;
Brown v. Clippinger, 113 Tex. 364, 256 S. W. 254;
Chapman v. Kellogg, 252 S. W. 151;
State Mortgage Corp. v. Traylor, 120 Tex. 148, 36
 S. W. (2d) 440;
Switzer v. Smith, 300 S. W. 31.

The fact that evidence was not introduced is not permissible in such collateral attack, especially where the judgment recites the fact that evidence was introduced. Failure to appoint an attorney or file a statement of facts are not matters that can be raised after so long a time but are mere irregularities in the proceedings.

Cornelius v. Early, 24 S. W. (2d) 757;
Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778.

Under the Texas statute service by publication is the only manner which service could be had upon a non-resident.

Erwin v. Holliday, 131 Tex. 69, 112 S. W. (2d) 177.

It is respectfully submitted that the petition for certiorari should be in all things denied.

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Of Counsel:

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STATUTES APPLICABLE

Historical

The present Texas statutes applicable to the questions involved in this litigation, being Articles 5520, 5521, 5522 and 5523, including the amendment thereof in 1931, of Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, had their beginning in Chapter 138, Acts of the Regular Session of the 29th Legislature of Texas (1905), and are the product of a number of subsequent re-enactments and amendments of the original act, as follows:

Acts of the Regular Session of the 33rd Legislature of the State of Texas (1913), Chapter 123, page 250, Volume 16, Gammel's Laws of Texas;

Acts of the 1st Called Session of the 33rd Legislature of the State of Texas (1913), Chapter 27, page 39, Volume 16, Gammel's Laws of Texas;

Acts of the Regular Session of the 39th Legislature of the State of Texas (1925), Chapter 64, page 215, Volume 22, Gammel's Laws of Texas; and

Acts of the Regular Session of the 42nd Legislature of the State of Texas (1931), Chapter 136, page 230, Volume 27, Gammel's Laws of Texas.

THE ACT OF 1905

MORTGAGES AND DEEDS OF TRUST—FIXING TIME WITHIN WHICH POWER OF SALE MAY BE EXERCISED.

Chapter 138.

H. B. No. 133)

An Act to fix the time within which the power of sale conferred in mortgages and deeds of trust may be exercised, and after which vendor's liens shall be presumed to be

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released and satisfied; and to repeal all laws and parts of laws in conflict.

Section 1. Be it enacted by the Legislature of the State of Texas: No power of sale conferred by deed of trust or mortgage on real estate executed after this Act shall become operative shall be enforced after the expiration of ten years from the maturing of the indebtedness secured thereby; and any sale under such power after expiration of such time shall be void, and such sale may be enjoined.

Sec. 2. When a vendor's lien is retained to secure purchase money in any sale of real estate after this Act shall become operative, the right to recover such real estate by virtue of the superior title retained shall be barred after the expiration of ten years from the maturity of the debt, and if suit is not brought for recovery of such real estate within such term, the purchase money thereafter shall be conclusively presumed to have been paid.

Sec. 3. It is further enacted that when the date of maturity of the debt referred to in either of the foregoing sections is extended, if the contract of extension is not signed and acknowledged according to law by the parties to the contract of extension and filed in the county clerk's office of the county in which the land is situated, the date of maturity as set out in the deed of trust, mortgage or deed, as the case may be, or, if there be one or more extensions of the date of maturity, the date of maturity set out in the latest contract of extension so acknowledged and filed, shall be conclusive evidence of the date of maturity of the indebtedness.

Sec. 5. All laws and parts of laws in conflict with the provisions of this Act are hereby repealed.

Sec. 6. The great necessity for this law, and the near approach of adjournment of the Legislature creates a public necessity, and an imperative emergency requiring that the rule that bills be read on three several days in

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each house be suspended, and the same is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

(Note.—The enrolled bill shows that the foregoing act passed the House of Representatives, no vote given; it was referred to the Senate, where it was amended and passed by a two-thirds vote, yeas 24, nays 0; the House of Representatives concurred in the Senate amendments, no vote given.)

Approved April 17, 1905.

Takes effect 90 days after adjournment.

(Acts of the Regular Session of the 29th Legislature of the State of Texas (1905), Chapter 138, page 12, Gammel's Laws of Texas, and Sections 1, 2 and 3 thereof, having been brought forward as Articles 5693, 5694 and 5695, Revised Civil Statutes of Texas, 1911, later becoming incorporated in Articles 5520, 5521, 5522 and 5523 of Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, by amendments in 1913, in 1925 and in 1931.)

THE ACT OF 1913

(a)

LIMITATIONS—AMENDS SECTIONS 5693, 5694 AND 5695, CHAPTER 2, TITLE 87, R. S. 1911, RELATING THERETO.

Chapter 123.

H. B. No. 620)

An Act to amend Sections 5693, 5694 and 5695, Chapter 2, Title 87, Revised Civil Statutes of Texas, 1911, relating to deeds of trust and vendor's lien notes, providing that powers of sale conferred by deeds of trust and mortgages heretofore or hereafter given shall not be executed after the indebtedness is barred by limitation and that the

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lien created thereby shall cease to exist; and providing that the superior title reserved in deeds of conveyance and vendor's lien notes heretofore or hereafter given shall not be executed or collected after the notes are barred by limitation and that the liens created thereby shall cease to exist; providing a time within which suit may be brought to enforce existing deeds of trust and mortgages, and those owning or acquiring the superior title reserved in vendors' liens and deeds of conveyance heretofore executed may bring suit and assert their claims; and providing how such liens may be renewed and continued; and providing that said sections shall hereafter read as follows; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 5693, Revised Civil Statutes of Texas, 1911, Chapter 2, Title 87, shall hereafter read as follows:

Article 5693. No power of sale conferred by any deed of trust or any mortgage on real estate heretofore executed, or that may hereafter be executed, shall be enforced after the expiration of four years from the maturity of the indebtedness secured thereby, and any sale under such power after the expiration of such time shall be void, and such sale may be enjoined and the lien created in such mortgages or deeds of trust shall cease to exist four years after the maturity of the debt secured thereby. Provided, if several obligations are secured by said mortgage or deed of trust, the same may be enforced at any time prior to four years after the note or obligation last maturing has matured and may be enforced as to all notes or obligations ~~and~~ then barred by the four years Statute of Limitation.

Sec. 2. That Article 5694, Revised Civil Statutes of Texas, 1911, Chapter 2, Title 87, shall hereafter read as follows:

Article 5694. The right to recover any real estate by

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virtue of a superior title retained in any deed of conveyance heretofore or hereafter executed, or in any vendor's lien note or notes heretofore or hereafter executed, given for the purchase money of such real estate, shall be barred after the expiration of four years from the maturity of such indebtedness, and if suit is not brought for recovery of such real estate, or for the foreclosure of the lien to secure such note or notes within four years from the date of the maturity of such indebtedness, or if suit is not brought within such time for the recovery of the land by the original vendor, or his transferee, or for the foreclosure of the lien given to secure such notes, the purchase money therefor shall be conclusively presumed to have been paid in any suit to recover such land or to enforce a lien thereon, and the lien reserved in any such notes and deeds conveying the land shall cease to exist four years after the note or notes have matured, provided the lien reserved in such note or notes may be extended as provided in Section 5695 of this Chapter and provided, if several obligations are secured by said deed of conveyance, the same may be enforced at any time prior to four years after the note or obligation last maturing has matured and may be enforced as to all notes not then barred by the four years Statute of Limitations.

Sec. 3. That Article 5695, Chapter 2, Title 87, Revised Civil Statutes of Texas, 1911, shall hereafter read as follows:

Article 5695. When the date of maturity of either debt referred to in either of the foregoing Articles is extended, if the contract of extension is signed and acknowledged as provided for in the law relating to the execution of deeds of conveyance by the parties to the contract of extension, and filed for record in the county clerk's office in the county in which the land is situated, the lien shall continue and be in force until four years after maturity of the notes as provided in such extension the same as in the

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original contract, and the lien shall so continue for any succeeding or additional extensions so made and recorded. The date of maturity set forth in the deed of conveyance or deed of trust or mortgage, or the recorded renewal and extension of the same, shall be conclusive evidence of the date of maturity of the indebtedness therein mentioned. Provided that the owners of all notes secured by deeds of trust or other liens and the owners of all vendor's lien notes reserved in deeds of conveyance which were executed prior to July 14, 1905, and which are more than four years past due at the time this Act takes effect, as shown by the original mortgage, deed of trust or conveyance, shall have twelve months after this Act takes effect within which they may bring suit to enforce the liens securing them, if same are valid obligations when this Act takes effect, and if suit is not brought within such time the right to bring suit to enforce such liens shall be forever barred; and provided, that the owners of all notes secured by deeds of trust or other liens and the owners of all vendor lien notes reserved in deeds of conveyance, which were executed subsequent to July 14, 1905, shall have four years after this Act takes effect within which they may bring suit to enforce the liens securing them, if same are valid obligations and not already barred by the four years statute of limitation when this Act takes effect, and if suit is not brought within such four years, or four years after they mature, they shall be forever barred from the right to bring suit to enforce the lien securing the same; and providing those owning the superior title to land retained in any deed of conveyance, or his transferee and those subsequently acquiring such superior title by transfer shall have twelve months after this Act takes effect within which to bring suit for the land, if their claim to the land is not otherwise invalid, and unless such suit is brought within twelve months after this Act takes effect, they shall be forever barred from bringing suit to recover the same.

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Sec. 4. The fact of the near approach of the end of this session, and the fact that there are a great many land titles in this State that are clouded by reason of vendor's lien and deed of trusts appearing on the records apparently unpaid, creates an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on three several days in each House, and this Act shall take effect and be in force from and after its passage.

(Note.—H. B. No. 620 passed the House of Representatives March 15, 1913, but no vote given, House refused to concur in Senate amendments and requested appointment of free conference committee, and House adopted report of free conference committee March 31, 1913, but no vote given; and passed the Senate with amendments by a two-thirds vote, yeas 23, nays 3, and Senate granted request of House for appointment of free conference committee and adopted report of free conference committee March 31, 1913, but no vote given.)

Approved April 3, 1913.

Takes effect 90 days after adjournment.

(Acts of the Regular Session of the 33rd Legislature of the State of Texas (1913), Chapter 123, page 250, Volume 16, Gammel's Laws of Texas, amending Articles 5693, 5694 and 5695 of the Revised Civil Statutes of Texas, 1911, became Articles 5693, 5694 and 5695 of Vernon's Sayles Annotated Civil Statutes of the State of Texas, 1914.)

(b)

LIENS—AMENDING ARTICLE 5695, REVISED STATUTES, 1911, RELATING THERETO.

Chapter 27.

H. B. No. 54)

An Act to amend Article 5695 Revised Civil Statutes of Texas, 1911, as amended by Chapter 123, Acts of the

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Thirty-third Legislature, relating to the renewal and extension of liens that are secured by deeds of trust, mortgages or original vendors lien on real estate, and providing that said Article shall hereafter read as follows; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 5695, Revised Civil Statutes of Texas, 1911, Chapter 2, Title 87, as amended by Chapter 123, Acts of the Thirty-third Legislature, shall hereafter read as follows:

Article 5695. When the date of maturity of either debt referred to in either of the foregoing articles is extended, if the contract of extension is signed and acknowledged as provided for in the law relating to the execution of deeds of conveyance by the party or parties obligated to pay such indebtedness as extended and filed for record in the county clerk's office in the county in which the land is situated, the lien shall continue and be in force until four years after maturity of the notes as provided in such extension, the same as in the original contract and the lien shall so continue for any succeeding or additional extension so made and recorded. The date of maturity set forth in the deed of conveyance or deed of trust or mortgage or the recorded renewal and extension of the same shall be conclusive evidence of the date of maturity of the indebtedness therein mentioned. Provided that the owners of all notes secured by deeds of trust or other liens and the owners of all vendors lien notes reserved in deeds of conveyance which were executed prior to July 14, 1905, and which are more than four years past due at the time this Act takes effect as shown by the original mortgage, deed of trust or conveyance, or last record extension shall have twelve months after this Act takes effect within which they may obtain such record extension as hereinbefore provided for, or bring suit to enforce the lien securing them if same are valid obligations when this Act takes

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effect and if such debt is not so extended of record, or suit is not brought within such time, the right to extend such debt of record, or bring suit to enforce such liens shall be forever barred; and provided that the owners of all notes secured by deeds of trust or other liens and the owners of all vendors lien notes reserved in deeds of conveyance which were executed subsequent to July 14, 1905, shall have four years after this Act takes effect within which they may obtain such recorded extension as herein provided for, or bring suit to enforce the liens securing them if same are valid obligations and not already barred by the four years statutes of limitation when this Act takes effect, and if such debt is not extended of record, or suit is not brought within such four years or four years after they mature, they shall be forever barred from the right to extend such debt of record, or bring suit to enforce the lien securing the same, and further provided if any such obligations executed subsequent to July 14, 1905, were barred by the four years statute of limitation on the 30th day of June, 1913, the owners thereof shall have four years within which to bring suit to enforce the lien securing the same; and providing those owning the superior title to land retained in any deed of conveyance or his transferee and those subsequently acquiring such superior title by transfer, shall have twelve months after this Act takes effect within which to bring suit for the land if their claim to the land is not otherwise invalid and unless such suit is brought *within twelve months after this Act takes effect*, they shall be forever barred from bringing suit to recover the same.

Sec. 2. The fact of the near approach of the end of this session and that great confusion exists by reason of the form of said Section 5695, as hertofore amended in the preparation of deeds of trust and extensions of liens and in the closing of loans thereon, creates an emergency and an imperative public necessity requiring the suspension of the constitutional rule requiring bills to be read on

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three several days in each House and this Act shall take effect and be in force from and after its passage.

(Note.—H. B. No. 54 was passed by the House August 18, 1913, but no vote given, and was passed by the Senate by a two-thirds vote: yeas 28, nays 0.)

Received in the Executive Office, August 19, 1913, and filed in the Department of State, August 20, 1913, without approval of the Governor.

Takes effect 90 days after adjournment.

(Acts of the First Called Session of the 33rd Legislature of the State of Texas, (1913), Chapter 27, page 39, Volume 16, Gammel's Laws of Texas, amending Article 5695 of the Revised Civil Statutes of Texas, 1911, being also Article 5695 of Vernon's-Sayles' Texas Civil Statutes, 1914.)

THE ACT OF 1925

RELATING TO NOTES SECURED BY DEEDS OF TRUST OR MORTGAGES ON LAND AND WHEN THE SAME SHALL BE BARRED BY LIMITATION.

H. B. No. 79)

Chapter 64.

An Act amending Article 5693, Chapter 2, Title 87, Revised Civil Statutes of Texas, 1911, as amended by Chapter 123 of the General Laws of Texas passed at the Regular Session of the Thirty-third Legislature, relating to notes secured by certain deeds of trust, or mortgages on land, and when the same shall be barred by limitation, and providing that powers of sale under deeds of trust or mortgages shall not be executed after the notes secured thereby are barred by limitation, and amending Article 5695, Chapter 2, Title 87, Revised Civil Statutes of Texas, 1911, as amended by Chapter 123, General Laws of Texas, passed at the Regular Ses-

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sion of the Thirty-third Legislature and as amended by Chapter 27, General Laws of Texas, passed at the First Called Session of the Thirty-third Legislature, relating to the renewal and extension of liens that are secured by deeds of trust, mortgages, or vendor's liens on real estate, and providing that hereafter said Articles shall read as herein; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Article 5693, Revised Civil Statutes of Texas, 1911, Chapter 2, Title 87, as amended by Chapter 123, General Laws of Texas, passed at the Regular Session of the Thirty-third Legislature shall hereafter read as follows:

Article 5693. No power of sale conferred by a deed of trust or other mortgage on real estate executed subsequent to the 14th day of July, 1905, and prior to the 1st day of July, 1913, shall be enforced after the expiration of ten years from the maturity date of the indebtedness secured thereby, and no power of sale conferred by any deed of trust or other mortgage on real estate executed on or subsequent to the 1st day of July, 1913, or that may hereafter be executed, shall be enforced after the expiration of four years from the maturity of the indebtedness secured thereby, and any such sale under such powers after the expiration of such times, shall be void, and such sale may be enjoined and the lien created in any such deeds of trust or mortgages as were executed subsequent to the 14th day of July, 1905 and prior to the 1st day of July, 1913, shall cease to exist ten years after the maturity date of the debt secured thereby, and as to all deeds of trust or mortgages as were executed on or subsequent to the 1st day of July, 1913, or that may hereafter be executed, the lien created thereby shall cease to exist four years after the maturity of the debt secured thereby; provided, if several obligations are secured by said mortgage or deed of trust, the same may be enforced at any time prior to four years

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after the note or obligation last maturing has matured and may be enforced as to all notes and obligations not then barred by the four years statute of limitations; provided, the lien created by such deeds of trust or other mortgages may be extended as provided in Section 1 of this Act amending Article 5695, Chapter 2, Title 87, Revised Civil Statutes of Texas, 1911, as amended.

Sec. 2. That Article 5695, Revised Civil Statutes of Texas, 1911, Chapter 2, Title 87, as amended by Chapter 123, of the Acts of the Thirty-third Legislature passed at the Regular Session, and as further amended by Chapter 27, Acts of the Thirty-third Legislature passed at the First Called Session, shall hereafter read as follows:

Article 5695. When the date of maturity of either debt referred to in either of the foregoing articles is extended, if the contract of extension is signed and acknowledged as provided for in the law relating to the execution of deeds of conveyance by the party or parties obligated to pay such indebtedness as extended and filed for record in the county clerk's office in the county in which the land is situated, the lien shall continue and be in force until four years after maturity of the notes as provided in such extension, the same as in the original contract and the lien shall so continue for any succeeding or additional extension so made and recorded. The date of maturity set forth in the deed of conveyance or deed of trust or mortgage, or the recorded renewal and extension of the same, shall be conclusive evidence of the date of maturity of the indebtedness therein mentioned. Provided the owner of the land and the holder of the note or notes may at any time enter into a valid agreement renewing and extending the debt and lien, so long as it does not prejudice the rights of lien holders or purchasers subsequent to the date such liens became barred of record under laws existing prior to the taking effect of, or under this Act; as to all such lien holders or purchasers any renewal or extension executed

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or filed for record after the note or notes and lien or liens were, or are, barred of record and before the filing for record of such renewal or extension, such renewal or extension shall be void.

Sec. 3. The fact that certain provisions of Articles 5693 and 5695, Revised Civil Statutes of Texas, 1911, as amended, have been held by the Supreme Court of Texas to be unconstitutional while sustaining the validity of other parts of said articles as amended, and the further fact that there exists conflicting holdings by the various courts of civil appeals of Texas as to whether or not the owners of the land and the holder of notes secured by deeds of trust or other mortgages and vendor's liens, may make valid renewals and extensions thereof after the same have apparently become barred of record under the law as now written, creates an emergency, and a public necessity requiring that the constitutional rule providing that bills shall be read on three several days in each House shall be suspended, and said rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted.

(Note.—The enrolled bill shows that the foregoing Act passed the House, no vote given; passed the Senate, no vote given.)

Approved March 9, 1925.

Effective ninety (90) days after adjournment.

(Acts of the Regular Session of the 39th Legislature of the State of Texas (1925), Chapter 64, page 215, Volume 22, Gammel's Laws of Texas, amending Article 5693, Revised Civil Statutes of Texas, 1911, and Vernon's Sayles Texas Civil Statutes, 1914.)

THE ACT OF 1931

“Revised Civil Statutes of Texas, 1911,” and “Vernon's Sayles Annotated Civil Statutes of the State of Texas,

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1914," were revised in 1925, and became known as "Revised Civil Statutes of Texas, 1925," and "Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925." By this Revision Articles 5693, 5694 and 5695 of the "Revised Civil Statutes of Texas, 1911," and of "Vernon's Sayles Annotated Civil Statutes of the State of Texas, 1914," became Articles 5520, 5521, 5522 and 5523 of the "Revised Civil Statutes of Texas, 1925," and "Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925," and now constitute the present statutes of the State of Texas applicable to certain issues involved in this litigation, subject to "The Act of 1931," hereinbelow quoted in full, which Act had for its purpose the elimination of the confusion existing as to when the bar of the statute fell on a series of notes or on an installment note.

LIENS AND TRUST NOTES SECURED BY LIEN ON REAL ESTATE.

H. B. No. 163)

Chapter 136.

An Act repealing Articles 5521 and 5523, and amending Article 5520, Chapter 1, Title 91, Revised Civil Statutes of Texas, 1925, relating to Vendor's Lien, Mortgage Lien, Deed of Trust Notes secured by lien on real estate, providing time and manner of the running of limitation thereon; and of actions to recover real estate by virtue of a superior title retained by vendors or grantors, and for the presumption of payment and existence of lien; providing the time and manner of enforcement of said notes and liens to secure the same, and for the expiration of the lien in certain cases; providing for the extension of liens and renewal of notes; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Articles 5521 and 5523, Chapter 1, Title

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91 of the Revised Civil Statutes of 1925, be, and the same are hereby repealed.

Sec. 2. The Article 5520, Chapter 1, Title 91, of the Revised Civil Statutes of 1925, be, and the same is hereby amended so as to hereafter read as follows:

Article 5520. Actions by vendors, etc. There shall be commenced and prosecuted within four (4) years after the cause of action shall have accrued and not afterward, except as herein provided, all actions of the following description:

1. Actions to recover real estate by virtue of a superior title retained by the vendor in a deed of conveyance or purchase money note.

2. Actions for the foreclosure of vendor's liens on real estate.

3. Actions to foreclose deed of trust or mortgage liens on real estate.

Provided, however, that where a series of notes may be given or any note may be made payable in installments, or if any other instrument is executed which creates an obligation on the Vendee or Grantee of real estate to pay for the same in installments or partial payments, limitation shall not begin to run until the maturity date of said last note or installment. Upon the expiration of four (4) years from and after the date of maturity of the last said note or installment, payment shall be conclusively presumed to have been made of each of said notes and installment, and the lien for the security of same shall cease to exist, unless the same is extended by an agreement in writing by the party or parties primarily liable for the payment of the indebtedness, as provided by law. The lien created by deeds of trust or other mortgages may be extended by an agreement in writing by the party or parties primarily liable for the payment of such indebtedness, and filed and

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recorded in the manner provided for the acknowledgment and record of conveyance of real estate.

No power of sale conferred by a deed of trust or other mortgage on real estate executed subsequent to the 14th day of July, 1905, and prior to the 1st day of July, 1913, shall be enforced after the expiration of ten (10) years from the maturity date of the indebtedness secured thereby, and no power of sale conferred by any deed of trust or other mortgage on real estate executed on or subsequent to the 1st day of July, 1913, or that may hereafter be executed, shall be enforced after the expiration of four (4) years from the maturity of the indebtedness secured thereby, and any such sale under such powers after the expiration of such times, shall be void, and such sale may be enjoined and the lien created in any such deeds of trust or mortgages as were executed subsequent to the 14th day of July, 1905, and prior to the 1st day of July, 1913, shall cease to exist ten (10) years after the maturity date of the debt secured thereby, and as to all deeds of trust or mortgages as were executed on or subsequent to the 1st day of July, 1913, or that may hereafter be executed, the lien created thereby shall cease to exist four (4) years after the maturity of the debt secured thereby.

Sec. 3. The fact that the Supreme Court of Texas has intimated that although a series of notes secured by a mortgage or deed of trust do not run by limitation until four (4) years from the maturity date of the last of such series, whereas, vendor's lien notes run by limitation four (4) years from maturity of each such note, all of which is confusing; and the fact that the present statutes relating to the running of limitation are confusing and ambiguous and the fact that limitation should run from the same date of all of such notes, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and that Rule is hereby suspended, and it is so enacted.

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Approved May 18, 1931.

Effective 90 days after adjournment.

(Note.—H. B. No. 163 passed the House by a viva voce vote; passed the Senate by a viva voce vote.)

(Acts of the Regular Session of the 42nd Legislature of the State of Texas, 1931, Chapter 136, page 230, Volume 27, Gammel's Laws of Texas.)

Article 5518, Revised Civil Statutes of Texas, 1925
and Vernon's Annotated Revised Civil Statutes
of the State of Texas, Revision of 1925.

If a person entitled to sue for the recovery of real property or make any defense founded on the title thereto, be at the time such title shall first descend or the adverse possession commence:

1. A person, including a married woman, under twenty-one years of age, or
2. In time of war, a person in the military or naval service of the United States, or
3. A person of unsound mind, or
4. A person imprisoned, the time during which such disability or status shall continue shall not be deemed any portion of the time limited for the commencement of such suit, or the making of such defense; and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title; provided, that notwithstanding a person may be or may have been laboring under any of the disabilities mentioned in this article, one having the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying same, shall institute his suit therefor

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within twenty-five years next after his cause of action shall have accrued and not thereafter. (Acts 1841, p. 163; P. D. 4621-4; Acts 1895, p. 35; Acts 1919, 2nd C. S., p. 139; G. L. Vol. 2, p. 627; G. L. Vol. 10, p. 765.)

Article 5538, Revised Civil Statutes of Texas, 1925
and Vernon's Annotated Revised Civil Statutes
of the State or Texas, Revision of 1925.

Limitation after death.

In case of the death of any person against whom or in whose favor there may be a cause of action, the law of limitation shall cease to run against such cause of action until twelve months after such death, unless an administrator or executor shall have sooner qualified according to law upon such deceased person's estate; in which case the law of limitation shall only cease to run until such qualification. (Id. P. D. 4606.)